Supreme Court, U. S.
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80-350

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SEA-LAND SERVICE, INC. and R. J. REYNOLDS INDUSTRIAL LEASING CORP.,

Petitioners,

—against—

JOHN MILOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In a Jones Act case where a 56 year old merchant seaman (chief engineer) was given a jury verdict for $360,000 on account of a personal injury consisting of a supposed aggravation of a pre-existing (by more than 6 years) arthritic condition in the first joint of the right thumb, upon showing of special damages of less than $700 at trial four years after the occurrence which was scheduled to suit his vacation plans, and upon his "proving" future total disability solely on the basis of testimony of expert witnesses, despite: (1) the fact that he had worked for 17 continuous months without interruption, save for vacations, until one week before trial and (2) that his claimed "injury" was never reported nor ever diagnosed; does summary affirmance by the Second Circuit Court of Appeals of the trial court's refusal to disturb such verdict, on grounds of excessiveness and errors in the charge and conduct of the trial, constitute so far a departure from the usual course of judicial proceedings, or the sanctioning of so far a departure by the district court, as to call for exercise of this Court's powers of supervision?

2. Was the district court's charge correct; was the trial properly conducted and was the verdict excessive and based on insufficient proof?

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PETITION OF SEA-LAND, INC. AND R. J. REYNOLDS INDUSTRIAL LEASING CORP. FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the trial court is reported at 478 F. Supp. 1019 (SDNY 1979) and is set forth in the Appendix, at A-2 to A-21. In June 13, 1979, Judgment was filed. Petitioners' motion for new trial was denied pursuant to opinion # 49092 filed on September 26, 1979. The appeal to the Second Circuit Court of Appeals was disposed of by "summary order" under provision of Rule § 0.23 of the Rules of the Second Circuit Court of Appeals[1] on March 20, 1980, the same day oral argument was heard. The summary order of the Court of Appeals is also set forth in the Appendix, at A-22 to A-25. On June 2, 1980, the Court of Appeals denied defendants' (petitioners') petition for a rehearing and for a rehearing *en banc*.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

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1. This rule, adopted by the Second Circuit under authority of Fed.R.App.Pro. 47, provides in pertinent part, as follows:

> The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion disposition will be made . . . by summary order.
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> * * *
>
> Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported . . ., they shall not be cited or otherwise used in unrelated cases before this or any other court.

STATUTE INVOLVED

Merchant Marine Act of 1920 ("Jones Act"), 46 U.S.C. § 688: Recovery for injury to or death of seaman:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

STATEMENT OF THE CASE

This action was brought by respondent John Milos, a former second assistant engineer aboard petitioners' vessel S/S SEA-LAND MARKET, pursuant to 46 U.S.C. § 688 *et seq.* and pursuant to the General Maritime Law, to recover damages for personal injuries allegedly sustained by him on May 5, 1975 as a result of a slip and fall aboard ship. Jurisdiction in the district court was founded upon 28 U.S.C. § 1331(a). Trial was begun on June 5, 1979 before the Honorable Irving Ben Cooper and a jury of six, resulting in a jury verdict in the sum of $360,000 in favor of respondent. The scheduling of trial in June 1975 was sought by re-

spondent as a convenience to his vacation plans.[2] It was respondent's claim that he was caused to slip and fall in a midshiphouse "cross-passageway" as the result of the presence on deck of "slop" giving the appearance of ketchup and mayonnaise. Although respondent's accident was unwitnessed, the presence of food material on the deck was conconfirmed by the testimony of petitioners through the vessel's chief mate. Thus, *the* issues, and what led to the case being brought to trial, were the nature and extent of plaintiff's injuries and the amount of resulting damages.

This case, as is characteristic of virtually all suits brought by seaman against their shipowner/employers as a result of shipboard injuries, presented a sharply disputed issue of fact. In this case the factual dispute centered around respondent's claim of having injured the admittedly previously arthritic base (at the junction with the wrist) of his right thumb, and as a result of this "injury" to have required surgical fusion of this diseased joint in September 1977 and to have been thereafter (as of, coincidentally, the time of trial) rendered permanently disabled. Petitioners lost on this issue at trial in the United States District Court, Southern District of New York (Irving Ben Cooper, J.) and its post-trial motions were unsuccessful. Petitioners then appealed to the United States Court of Appeals for the Second Circuit, and this too was unavailing, the court summarily rejecting petitioners' arguments. In addition, petitioners applied for rehearing and suggested the appropriateness of rehearing *en banc*. This application was also rejected, no active judge, nor judge who had been a member

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2. On November 17, 1978 respondent's former attorney wrote to the district court informing the trial judge that respondent would be joining the S/S AMERICAN CORSAIR as chief engineer on December 9, 1978 but that "he . . . [would] . . . be on vacation definitely in June, July or August [1979]". He asked for and was given a trial date ". . . in June, July or August." (See 115A). (References followed by the letter "A" refer to the Joint Appendix in the Court of Appeals).

of the panel, requesting that a vote be taken on whether the summary order should be reconsidered.

Because of the virtual exhaustion of procedural avenues of post-verdict review, this Court *should be* assured that the result sanctioned by the district court, a three judge panel in the Court of Appeals and the entire active bench of the Second Circuit, a verdict for personal injuries in the amount of $360,000, does not represent a miscarriage of justice. Moreover, the trial judge who should best know the merit of the case, in a lengthy opinion denying petitioners post-verdict motions pursuant to Fed.R.Civ.P. 50(b) and 59, most emphatically rejected argument of petitioners for a new trial on grounds of errors in the charge, mistakes and partiality in the conduct of the trial and that the verdict was excessive and based on legally insufficient evidence. Indeed, the district court held:

> In fact, it appears to us that the jury, being entrusted with the obligation and duty to decide the issues of fact posed in this case, carried out its duty admirably and effectively. The total trial record demonstrates sufficient evidentiary support of the verdict. 478 F. Supp. at 1024-5.

And further:

> Points we emphasize here [in denying petitioners' motions] are Milos's own credibility and restrained evaluation of his disability; the medical evidence supporting the jury's evaluation of his incapacity to perform his job in the future; the testimony as to his wages lost—past and future, all of which would tend to support, on the record as a whole, the verdict awarded by the jury. 478 F. Supp. at 1027.

The district court additionally held:

> The testimony at trial, by plaintiff himself and by supporting and opposing medical witnesses, presented substantial and convincing evidence that plaintiff had indeed suffered the accident he claims on May 5, 1975 [and in the footnote next following]

> [that] he stepped on a slippery food substance . . . and fell, injuring the right side of his body; [and that] the injury so aggravated a pre-existing arthritic condition . . ., that it caused him great physical discomfort, led to his ultimate disability and made him unable to continue his work as a chief marine engineer. 478 F. Supp. at 1022.

The district court further held that ". . . [t]here was testimony from plaintiff's [respondent's] medical witnesses that Milos's grasp and grip were almost completely lost because of the shipboard accident on May 5, 1975. Both doctors[3] unequivocally stated that Milos could not and should not return to work as a marine engineer" (478 F. Supp. at 1024); and that the wages lost by respondent for his initial disability period (May-August 1975) were between 10 and 15 thousand dollars and (by implication) that the loss for the period of the second disability (July-December 1977) was still greater (*Id.*).

The Court of Appeals failed to address the excessiveness issue or the issue of the district court's abuse of discretion in "weighing" the evidence but rejected argument that the trial court had erred in its charge concerning, in an aggravation case, the proper standard of awarding damages, because the charge "sufficiently" instructed the jury that damages should be awarded to the extent that his "fall" resulted in additional harm to his arthritic thumb. The court also rejected petitioners' appeal regarding judicial misconduct and errors in the admission of medical testimony, since such did not constitute "reversible error."

The Court of Appeals having failed to confront the issue of excessiveness or to describe and evaluate the trial cir-

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3. Respondent called two expert medical witnesses at trial: Benjamin Golub, M.D. and Dale Bouton, M.D. to whom the court was referring in this part of its opinion. Neither treated respondent. Respondent also read at trial the testimony of John Wickenden, M.D., the surgeon who fused the diseased first joint of respondent's thumb in September 1977.

cumstances, and the district court having failed in any real sense to weigh the conflicting evidence or, indeed, to confront its errors, we must do so here.

(a) Respondent's Injury.

Respondent slipped and fell aboard ship May 5, 1975 as a result of the presence of a foreign substance on deck which would readily be seen as both the result of ship's negligence and as an unseaworthy condition. There *never was* a serious issue of liability for plaintiff's damages.

Following the accident and, indeed, within minutes of its occurrence, respondent reported having injured himself to the chief mate. Shortly after his fall he, in a formal written report,[4] described his injuries as consisting of: "bruised elbow (R)." He was treated by the ship's medical officer the day of the occurrence for an "abrasion of the right elbow" (14E). He was seen at Bremerhaven on May 6, 1975 by two doctors, one a radiologist, following which he returned to the vessel with a master's certificate containing a diagnosis of "bursitis ri [right] elbow" and a statement from the examining doctor that respondent was "fit for duty" [16E]. On May 12, 1975 upon the vessel's arrival in New York, respondent was seen at the United States Public Health Service Hospital, Stapleton, Staten Island at which time according to the records (19E) his elbow was "not painful." He was declared fit-for-duty. These records contain no reference to any complaint of a thumb pain or any thumb injury.

Respondent left the vessel May 27, 1975[5] and went home to Maine. He was seen at the Portland, Maine Public Health Service Outpatient Clinic May 29, 1975. At that

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4. "Statement of Person Claiming Injury," appearing at 80E, the Exhibit Volume of the Joint Appendix.

5. Respondent was aboard the vessel at a so-called medical relief for the ship's regular second engineer, a man named Tauza, who returned from leave that date.

time, again according to the records (22E), he complained of his elbow *only*. Respondent, according to the duty status slip given him May 29, 1975 (21E), was "unwilling" to go to the Public Health Service Hospital in Brighton, Massachusetts and had indicated that he would seek treatment privately. Neither the Portland clinic record nor the duty status slip refer to any complaint of injury to or discomfort in respondent's right thumb.

Respondent was next seen on June 6, 1975 by a Dr. P.O. Gregory who was affiliated with St. Andrew's Hospital. The record of this treatment reflects that respondent reported a fall occuring April (sic) 1975 and that he had had "pain to Rt [right] elbow since" (23E). Dr. Gregory, who saw respondent only once, indicated that plaintiff would be fit for duty on June 27, 1975. An x-ray taken at St. Andrew's Hospital June 6, 1975 was read as showing soft tissue swelling of the right elbow as well as an irrelevant diagnosis (so characterized by one of respondent's medical experts, Dr. Benjamin Golub, 611A), of fracture of the distal tuft, right thumb. Dr. Golub, when he read the actual x-ray at trial, further criticized the St. Andrew's x-ray report for not noting the presence of arthritis which was, according to the expert, within a month of the occurrence, "as clear as the nose on my [Dr. Golub's] face" (912A).

Beginning June 30, 1975 respondent came under the care of a Dr. Brotman who referred him to a Mr. Levinson, a physiotherapist associated with Waldo County General Hospital, Belfast, Maine. The records of this treatment refer to a "shoulder/hand injury" (the physical therapy record, 26E) or to "old" fracture of small chip at "M-P" (metacarpo-phalangeal) joint (according to Dr. Brotman's note, 37E), which latter diagnosis was also considered by respondent's medical experts to be erroneous. The physiotherapy records reflect a finding of a secondary "adaption" of the second or M-P joint in that this was, in June/July 1975, capable of hyperextension. This finding indicated

longstanding arthritis and restriction of movement in the first joint which existed well prior to the alleged May 5, 1975 thumb injury, according to another of respondent's medical witnesses, his treating surgeon John Wickenden, M.D. who surgically fused the diseased joint in September 1977 (See, 1240-1241A).

The trial record amply reflects the fact (1) that respondent never complained, despite being seen by four doctors at three separate clinics of any thumb injury or thumb pain until at least 32 days after the injury, (2) that he did not, when apparently initially reporting thumb difficulty on June 6, 1975, associate those complaints with his shipboard fall and (3) that no *accurate* diagnosis was ever made of *any* injury other than that of a totally nonspecific "hand/shoulder injury," which was apparently made, not by a doctor, but by a physiotherapist.

(b) The Condition of Respondent's Thumb Prior to May 5, 1975 and the Nature of His Underlying Disease.

Respondent had osteoarthritis in the first joint of his thumb in 1969, according to Dr. Golub. Hence, in this doctor's opinion respondent had ("absolutely") a "longstanding" osteoarthritic condition at the base of the thumb in July 1975 (914A) which was "longstanding existing and existing well before May 5, 1975" (*Id.*). These arthritic changes were present in part "earlier than 1969" (918A). Dr. Bouton agreed that respondent had pre-existing osteoarthritis (1924A). Dr. Bouton, according to his report of examination of August 5, 1975, had "advanced" arthritis in the afflicted joint at that time, which had resulted, within three months of the "injury," in "almost spontaneous fusion" of the joint (1076A). Mr. Levinson, as mentioned, found an adaption of the thumb's second joint in June/July 1975 which Dr. Wickenden said was pre-existing, caused by arthritis in the first joint and had developed slowly over time.

(c) The Nature of the Injury Assumed by Respondent's Medical Experts and its Supposed Effect in Respondent's Diseased Thumb.

Of the two doctors who testified at trial for respondent, Dr. Bouton, who initially examined respondent on August 5, 1975, saw him first. On August 5, 1975 Dr. Bouton observed no evidence of recent trauma. He observed, however, in addition to "advanced" arthritis and "almost spontaneous fusion" a small chip of bone isolated from this joint[6]. Dr. Golub did not see respondent until 1977. Neither could testify directly to the nature of the injury supposedly occurring May 5, 1975 which was also not, at least accurately, diagnosed, according to the records, by any treating doctor. Both doctors, nonetheless, proceeded, at least initially to make a retrospective diagnosis of a sprain[7] over the unsuccesful objection of petitioners. Thus Dr. Golub thought physiotherapy to be a course of treatment consistent with a sprain, despite Dr. Brotman's description of the presence of "osteoarthritis" and his prescription of anti-inflamation medication (924A-925A). Also found significant by both Drs. Golub and Bouton was the physiotherapist's notation of increased range of motion. Dr. Bouton, for his retrospective sprain diagnosis, also relied on "swelling" of the thenar emminance which he observed August 5, 1975 but which he admitted was consistent with arthritis (1084A). Neither doctor persisted in claiming that respondent had sustained a "severe" sprain which Dr. Golub said he doubted had occurred (950A; but see 809A). Dr. Golub ultimately said that the "sequellae of [the assumed shipboard injury] culminated in a degree of pain that caused

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6. This was apparently the "old" chip fracture referred to by Dr. Brotman. Respondent fractured his wrist in 1969 and x-rays of his right hand at that time showed the same "ossicle." This, according to Dr. Golub was "old" at the time of the 1969 injury and, of course, was unrelated to the matter in suit.

7. The pre-trial order filed in district court did not *claim* that respondent had sprained his thumb.

him to seek surgical relief" (948A). Dr. Bouton was of the basic opinion that the nature of the injury was all but irrelevant because any contusion which caused pain and drew respondent's attention to his thumb "caused" the need for surgery. Yet Dr. Bouton could not say how hard respondent would have had to hit his thumb in order for the resulting contusion to have contributed to the need for surgery (See 1985A-1087A).

(d) The Change in the Condition of the Diseased Joint Between August 1975 and August 1977.

According to the trial testimony or both Drs. Golub and Bouton, in the aftermath of the "injury" the condition of the diseased joint deteriorated, leading eventually for the need for survery to relieve pain. However, in his report of his second examination of respondent on August 22, 1977 (74E), Dr. Bouton said that respondent "still presented" markedly restricted motion of the thumb. He also again reported "advanced" arthritic changes in the diseased joint and recommended against surgery (which, at the time of this report, October 3, 1977, had already been performed) because there was "no change in his status from 1975 to the present time."[8]

(e) The Effect of Surgical Fusion in September 1977 and the Resulting Condition of Respondent's Right Hand.

Dr. Wickenden said that surgical fusion resulted in improvement of respondent's grip (1205A). All three doctors agreed that the surgery, in exchange for destruction of all range of motion accomplished by surgical fusion, achieved relief from pain. Dr. Wickenden believed after surgery that respondent suffered a 10% loss of use of the hand

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8. The doctor's report in unambiguous. It is also inconsistent with his testimony, in which he attempted to say that respondent's arthritis had advanced between 1975 and 1977. (See 1136A-1137A).

(1191A). Dr. Bouton believed plaintiff had suffered a 50% loss of function of the thumb (1041A). Dr. Wickenden, whose testimony was presented in deposition taken before respondent was claiming that he could not work as a chief engineer, was not asked about any total disability. Drs. Golub and Bouton testified that respondent was totally disabled for any work aboard ship based on a description of duties of "marine engineers" (including ratings lower than chief) prepared by a maritime expert called by respondent named Zornes.[9]

(f) Plaintiff's Wage Loss Prior to Trial.

Plaintiff left S/S SEA-LAND MARKET May 27, 1975 and applied for vacation benefits from his union on May 28, 1975. On that day he was paid $8,231.76, a sum representing "accrued days due" of 92.43 days. As a result of accepting vacation benefits he was given a "return to work date" of August 27, 1975 (86E) and until that time was ineligible to work (630A). He registered at the hiring hall August 28, 1975 and worked aboard ships in port as a night engineer (493A). He joined a United States Lines vessel as chief engineer on October 6, 1975 and thereafter lost no time on account of his thumb until July 1977 when he got off another United States Lines vessel to go on vacation. This vacation period began July 12, 1977 and ended December 17, 1977, respondent's back to work date and the day he would have been, in any event, eligible to sail.

Respondent claimed to have gotten off the second United States Lines vessel in 1977 in order to seek further medical

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9. Zornes characterized the duties of a chief engineer as "... not the job of manual labor most of the time." (1310A) Respondent worked only as a chief engineer after his accident, and he had worked mostly as chief before. Beginning in 1978 he worked as a United States Line's chief engineer on a "permanent" basis.

treatment of his thumb, just as he had claimed that he had gotten off S/S SEA-LAND MARKET on May 27, 1975 for that reason.[10] But respondent did not go to any doctor on account of his thumb until August 29, 1977. He first saw Dr. Wickenden, whom he visited that day, while hospitalized on August 3, 1977 (1141A) as a result of a back injury occurring July 26, 1977 (639A-640A).

Respondent returned to sea as a chief engineer January 3, 1978 (15 days after his 1977 return date) and admittedly lost just 15 days during which, without considering any question of disability he could have worked during either "disability" period. Plaintiff said, moreover, that he would have, in any event, waited for his January 3, 1978 ship, making his lost wages, not what he would have earned as a chief engineer aboard ships at sea, but what he would have earned as a relief or night engineer for that period. In the period between August 28 and October 6, 1975, when he also waited for "his" ship, he earned $1,658.49 over that 40 day period (493A). For 15 days in December/January 1977-1978 he lost wages amounting to 15/40ths of $1,658.49, or less than $700.[11]

In refusing to disturb the verdict as excessive, the trial judge held that "[a] key fact that defendant fails to confront is that Milos would be earning in the range of $60,000 per year if defendant had not caused the injury which ultimately disabled him." This figure was based on speculative testimony by respondent's "economist", an official of respondent's union named Lamy. Lamy testified that a

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10. At trial respondent claimed not to have known that he was being relieved because of the regular second engineer's return from medical relief, or to know whether in fact Tauza had relieved him. Evidence tending to contradict this claim, by demonstrating that Tauza did return and that crewmembers are told that when they are being relieved, was not permitted in evidence. (See 1499A, 1495A-1498A, and 88E-Ex. M).

11. This is obvious an attempted calculation of special rather than general damages. It is not disputed that respondent was entitled to claim for loss of enjoyment of his vacation.

chief engineer working aboard ship for 7½ months would be paid $59,140 under the present contract of which $19,167 would be vacation pay. If vacation pay is properly included as lost future wages[12] it *also* should be seen as wiping out a lost wage claim for those periods when vacation benefits were paid.

(g) Respondent's Credibility.

Respondent claimed that he slipped and fell in a passage twelve feet wide, bulkhead to bulkhead. It was claimed that respondent had fallen to his right and back while very close to the bulkhead on his left hand side. He supposedly struck his right hand on "the" bulkhead when he fell. This at least was the hypothetical accident described prior to trial to Dr. Wickenden, who was told that "his thumb hit up against the bulkhead" (1207A). Dr. Bouton, at trial, was asked to assume that respondent's right hand struck a bulkhead when he fell to his right (1002A). But this bulkhead was almost 12 feet away, according to plaintiff (520A), making either bulkhead indeed difficult to hit. Thus, when questioned by the court: "you hit the bulkhead, did you," respondent said "yes" (433A). When asked on cross-examination: "If I recall your testimony correctly, you claim that your right hand struck the bulkhead. Isn't that so," respondent testified: "I don't remember whether it did or not. As I told you, it happened in a split second. I slipped and I ended up on the floor. I don't remember anything in that split second" (543A). And again: "Did you ever claim at trial in your direct examination that your hand had gone out to the right and it struck the bulkhead . . . ," to which respondent said "I don't remember." (*Id.*)[13]

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12. It should be because it depends on days worked and *must* be taken, according again to Lamy (1364A).

13. The trial court asked the following question of Dr. Bouton: Q. "In most cases, I take it when an accident takes place the person just has a most sketchy notion of what happened,

The records relating to the accident or to any subsequent medical treatment, as mentioned, do not, prior to June 6, 1975, refer to any thumb complaints. But respondent testified that when leaving S/S SEA-LAND MARKET May 27, 1975 he went to the Public Health Hospital in Staten Island, to seek treatment for his thumb, only to be told to go to the Public Health facility near his home in Maine (445A). The Staten Island Hospital records are devoid of reference to such visit. Respondent claimed that he was told by the Portland Clinic doctor May 29, 1975 that he needed to be seen by an orthopedist for his thumb, thus accounting for the missing reference to any thumb complaint. He denied saying that he was unwilling to go to Brighton (592A: "I said no such thing" and then, contradicted himself at 594A by admitting, "I said that part . . ."), claiming to the contrary that he went to the Massachusetts Public Health Service Hospital on or about June 1, 1975 (588A-589A). The records of this visit *do not* include reference to any thumb complaint. This 200 mile trip (to Brighton) was fruitless as, according to respondent, he was advised by the hospital's receptionist that no orthopedist would be available (590A). These hospital records contain no entry of any June 1975 visit. Respondent supposedly returned home and began, by reference to the local telephone directory, to try to locate an orthopedist nearby. The efforts were unsuccessful. He was then treated by Drs. Gregory and Brotman, neither of whom was an orthopedist (609A).

Respondent excused his initial failure to complain about his thumb on basis of supposedly distracting pain in his elbow. However, when at Public Health, Stapleton, Staten

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it took place so fast; I slipped or an automobile clipped me and knocked me over, isn't that really the size of what most of them give you. A. He is a big man, he fell and he injured his *right upper extremity.*"

This suited respondent's attorney who offered the same explanation in summation. (298A-299A-301A).

Island for the first time on May 12, 1975, he, according to the records, said that his elbow was "not painful" (19E). In addition, respondent said that August 28, 1975 was the day Dr. Brotman said he would be fit-for-duty. This was "coincidentally" the day he was eligible to return to sea (631A). He said he "believed" Dr. Brotman had made the determination that he would be fit August 28 (620A). Respondent's thought that he "had" something in writing to that effect from Dr. Brotman but could not produce it (620A). He was not sure but he thought so (621A). He "reasoned" that there had been such a document (623A) although he could not recall ever seeing it (624A). Respondent "explained" (633A) this by saying that he went and tried to find Brotman "whom plaintiff understood . . . moved to Minnesota" (634A). And finally, respondent claimed the need for treatment of his thumb as the reason for getting off ship July 12, 1977, when in fact he sought treatment only after being hospitalized for his back. And all this the trial judge found "credible."

(h) The Infirmity of Respondent's Claim of Causal Connection Between the Shipboard Thumb Injury and His Alleged Thumb Injury

Dr. Bouton admitted that he did not know the actual condition of respondent's thumb prior to the accident and of course neither did Dr. Golub. Neither doctor knew, nor could assess, in light of the medical records, the nature, severity or extent of respondent's injury, save for what a reasonable man might assume (if not convinced of plaintiff's "explanation") on the basis of the deferral of complaints for 32 days.[14] Hence, the testimony of Drs. Golub and Bouton was purely speculative and can-

14. Dr. Bernstein, petitioners' expert, testified that the absence of a contemporaneous complaint "ruled out" the possibility that the shipboard fall had anything to do with the later need for surgery. Dr. Wickenden on the basis of the Report of the Person Claiming Injury and "all of the medical reports" said: "... In the very broadest sense, I think there is major doubt whether the fall on or

not form sufficient basis for the verdict. In turn, since the degree of contribution to be accorded the "injury" to the development of respondent's arthritis could not be established, the lost future wage testimony of the economist, Lamy, was speculative and should not have been admitted. But the entire case for "causal connection" was made *doubly* speculative by virtue of the nature of the underlying disease process. Respondent's arthritis was by its nature *progressive.* Respondent's medical witnesses, Drs. Golub and Bouton claimed that respondent's arthritis *had* progressed between 1969 and late spring and summer 1975 *and* between that latter time and surgical fusion in September 1977. This raised the possibility that had no injury occurred surgery would have, in any event, been required. Thus, Dr. Wickenden testified: "that joint would have become that sick [so sick that it would be sending "signals" of which plaintiff would have been consciously aware] eventually over years. With normal evolution of this process, he would have become symptomatic there with normal wear and tear . . . " (1209A). Dr. Bouton spoke of the "injury" as an "aggravation of the arthritis in that joint itself . . . " (1932A) which failed to improve—"[b]ecause of the acceleration . . . in the arthritic *process* in the joint involved (*id.*) When asked whether, in the absence of the trauma, respondent would have had need for [the] surgery " . . . that was done in September 1977," Dr. Bouton said: "No Sir. He might have gone quite a while" (1034A). On direct examination, Dr. Golub, who said on cross-examination that in his opinion respondent would have gone "indefinitely" without need for surgery, was

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about May 5, 1975 had a major causal relation to the ultimate need for surgery, and I note in association with that observation Mr. Milos' allegations to the contrary, which have been my primary guiding information for the presumptions I have made during my conduct with him." (1275A).

asked *only* whether, had no injury occurred, respondent would have "gone to surgery" when he did in September 1977.

Unquestionably the issue of the inevitability of surgery in any event was present in the case, as was the question of damages resulting from *merely* a hastening of the need for surgery. This possibility the court charge wholly failed to accommodate. Further, as a deliberate but mistaken choice of the law applicable to seaman's cases, the court ruled the issue irrelevant by, in part at least, charging that petitioners were liable for "any *damages*" which were but "contributed to" although "even the slightest," by petitioners' breach of duty.

(i) The Mistake of the Court's Charge Re Causal Connection.

The problem with which the district court was confronted was how properly to charge the jury on the issue of "causal connection" in light of the testimony of respondent's witnesses that respondent not only had pre-existing arthritis in the supposedly affected joint prior to 1969 but that his arthritis was progressive.

The "solution" to the problem was seemingly simple: (1) the jury should have been told that petitioners were liable only for those damages "caused by" his shipboard injuries and, (2) in light of the progressive nature of his disease, they should *not* have been charged that respondent's damage claim was unqualified subject to the so-called "thin skull"[15] rule of causal connection, applicable where no issue was raised of the inevitability of disability as the result of the natural progression of the underlying conditions.

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15. *Dulieu* v. *White,* [1901] 2 K.B. 669.

The Honorable Irving Ben Cooper charged the jury on the "causal connection" issue at great length[16]. From this repetitive and contradictory charge we have taken the following representative excerpts:

> ...On the subject of aggravation of an existing condition... the purpose of the law is to award as far as possible just and fair compensation for the loss or injury that *directly flowed* from the wrong done to plaintiff. Therefore, in considering damages, you may only make an award for those injuries which were *caused by* the shipowner's failure of legal responsibility. (At B2).
>
> * * * *
>
> If you find both... negligence or breach of warranty to causing, aggravating or accelerating... [a] pre-existing condition, the shipowner is not relieved of liability. Under the maritime law, if the shipowner's negligence or any unseaworthy condition aboard ship have *played any part, even the slightest,* in *contributing to* the advancement of Mr. Milos' pre-existing condition, if any, he is entitled to recover damages.
>
> If an unseaworthy condition relating to this accident aboard ship contributed *in any part, no matter how slight,* to accelerating, aggravating or precipitating any pre-existing condition . . . , he is entitled to recover (B3).
>
> * * * *
>
> . . . If he had a pre-existing condition . . . and that . . . condition was aggravated or accelerated by defective conditions aboard ship in his working area, then the shipping company is liable to him in damages *for that aggravation or acceleration.* (*Id.*).
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> * * * *

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16. Those parts of the charge having to do with this crucial issue are reproduced in their entirety and included in Appendix B. Emphasis appearing in those parts of the charge which immediately follow is, of course, in all cases supplied.

> The fact that plaintiff may have had a pre-existing condition, if you so find, does not bar his right to recover if the shipboard condition was an aggravating or accelerating factor, *no matter how slight,* for the law is that the defendant—I repeat—takes the plaintiff as he finds him and must compensate him for *any damages* that may have been *contributed to in any part* by a defective condition aboard ship. (B3-B4).
>
> • • • •
>
> Here are the words of a celebrated case laid down by the high court. "However little the incident might have injured the hand, arm or shoulder"—I am interposing those words applicable to this case, and, arm or shoulder. "However little the incident might have injured the hand, arm or shoulder of a normal man, if it injured the plaintiff enough to subject him to a long and severe and even permanent ordeal, the defendant must completely indemnify him regardless of his idiosyncrasy." (B4).

Unquestionably, *some of* the Court's charge upon the issue was correct. Undeniably a tortfeasor, under the law applicable to these cases, or to any other injury case, is liable in an "aggravation" case involving an "idiosyncratic" plaintiff with a latent predisposition to unusual harm, for the damage consequences of the effect of a disability "caused by" (in the legal rather than medical sense) an injury. Just as undeniably, an employer in a Jones Act case is *not* liable for "any damages" which its breach of duty but "contributed to." To charge that a defendant takes the plaintiff as he finds him, and must compensate him for any damages that may have been contributed to in any part by a defective condition aboard ship, is flat error.[17]

This contradiction in the charge was *not* an inadvertence. Very much a matter of concern at trial was the claim of respondent that in a seaman's action the measure of dam-

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17. Taken literally it would also deprive the shipowner of its defense of comparative negligence.

ages for an "aggravation" was a matter controlled by those Jones Act cases establishing the rule of "even the slightest" as the proper test of causal connection between negligence and injury.[18] At trial, petitioner lodged its "basic objection" to respondent's requests to charge on grounds of respondent's claim that "even the slightest" applied, not just to the connection in a Jones Act case between negligence and the injury, but connection between "an injury" and a "disability" (and, hence, damages) as well (290A). Respondent rejoined to this objection by referring to the facts and holding of *Gallick* v. *Baltimore Ohio R. Co.*, 372 U.S. 108 (1963). The court expressed apparant agreement with the propositon that the case was relevant to the question of the needed connection, in this case, between respondent's aggravation claim and claim of total disability as a result (*Id.*).

The charge quoted above unquestionably reflects, in part, the thinking that some injury need contribute only "in the slightest" to the disability claimed, for a shipowner in a Jones Act case to be liable for the whole disability. This was acknowledged by respondent, his attorney objecting after the district court's charge on "proximate cause" on grounds that there was (as a result of the conflict between "caused by" and "contributed to") "some contradiction" and "an element of ambiguity potentially," adding that respondent "would be taking some strong exceptions" to the charge if "the language that was being used" (i.e., "caused by") had not been altered by the court's later using language (i.e., "contributed to, even in the slightest"), ". . . when the court dealt with the issue of [the] pre-existing arthritic condition," which according to the attorney, made "very plain principles of law with which of course I do agree with" (385A). Judge Cooper charged

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18. *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957) and *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963).

verbatim respondent's request on this key issue.[19] On appeal, as Point III to its answering brief, respondent, rather obliquely, defended the court's charge on grounds that the district court instructed the jury that the defendant ". . . is never liable for more than it caused or contributed to."[20]

Moreover, and as importantly, the district court, despite a charge consuming 86 pages of transcript, never once told the jury to consider the progressive nature of plaintiff's arthritic condition, and repeatedly charged "thin skull," which if unqualified is inconsistent with progression. Further, the "cause of disability" issue was not, on the facts of the case, properly charged in terms *only of* activation of a "quiescent" condition (making the aggravation the sole cause of disability) or, at the polar extreme, that the "injury" had no effect on the development of respondent's disease. Despite this, the court's charge purposefully failed to explain to the jury the damage consequences of the "third" possibility—the one irrelevant if the *Rogers/Gallick* rule applies, that the effect of the alleged shipboard injury merely advanced in time the date of plaintiff's alleged total disability.[21]

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19. All of that part of the charge dealing with "thin skull" or "contributed to" was taken, all but word for word, from respondent's requests.

20. In direct examination of Dr. Golub respondent inquired whether the accident of May 5, 1975 was a competent "contributing" cause of pain and later surgery, to which petitioner objected on grounds that the injury need be, not a contributory cause, but a producing cause (844A-845A). That question was withdrawn. In cross-examination of Dr. Bernstein, the attorney insisted upon "competent contributing cause" (1487A) and petitioners' objection was overruled.

21. This objection was "treated" on appeal by respondent's claim that "the [petitioners] never laid the proper evidentiary foundation for a charge limiting damages to acceleration of disability" (Respondent's appellate brief, Point IV). But as has been already pointed out, Dr. Wickenden, *respondent's* witness, stated: "that

In this case, where reasonable men might suspect that the never reported, never diagnosed thumb "injury" played *no* part in advancing the progress of respondent's arthritis, or, at worst, played a minor role in "advancing" a terminal condition; where respondent was permitted to claim permanent disability on a purely speculative basis; where the court's charge excluded possibility of a partial attribution of damages, the Court of Appeals refused to consider the question whether the verdict for $360,000 was: (1) based upon legally sufficient evidence or (2) upon legally insufficient evidence or (3) was contrary to the great weight of the evidence and excessive (Respondent's Brief in Court of Appeals, "Issues Presented," No. 3). The summary order makes no reference to any opinion of the issues of the sufficiency of respondent's proof, or the appropriateness of the damage award. Further, since the charge was wrong, contradictory and incomplete, the Court of Appeals ignored its own precedent and precedent of this Court in refusing to disturb the verdict. The standard of a proper charge is not just "sufficiency."

POINT I

The "Even the Slightest" Rule Under the Jones Act is a Standard of the Shipowner's Liability; It Is Not the Measure of Damages in a Seaman's Case.

The common law principles which govern the recovery of damages in a tort action were set forth by the New York Court of Appeals in *Steitz* v. *Gifford*, 280 N.Y. 15 (1939):

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joint . . . would have become that sick [so sick that it was sending pain signals of which plaintiff would become consciously aware] eventually over years. I don't pretend to tell you exactly how many. With normal evolution of this process, he would have become symptomatic there with normal wear and tear (1209A)."

> The person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act according to common experience and in the usual course of events, whether the damages could or could not have been foreseen by him. The damages cannot be remote, contingent or speculative. They need not be immediate, but need to be so near to the cause only that they may be reasonably traced to the event and be independent of other causes. (280 N.Y. at 20).

Although, as the Court of Appeals noted, these general principles are well established and generally understood, "difficulties arise in their application to the peculiar facts involved in a particular case before the court." (*Id.*) The existence of a pre-existing condition in a plaintiff upon which a tortfeasor's negligence operates constitutes precisely one of those "peculiar facts" which complicates the application of general damage principles.

Thus, if a plaintiff's pre-existing condition is a latent disease which, on the basis of medical testimony, was *progressive* and would have been disabling at some point in plaintiff's life even in the absence of defendant's negligent conduct, defendant's negligence may accelerate the process and reduce the "dormant" period, but clearly could not be said to have produced the disease itself. In such situation, the only damages "resulting directly from and as a natural consequence of the wrongful act" which are "independent of other causes" (and, therefore, the only matter for which damages are recoverable from the defendant) is the acceleration or precipitation of the disease and not the disease itself. *Steinhauser* v. *Hertz Corporation,* 421 F.2d 1169 (2d Cir. 1970); *Sweet Milk Co.* v. *Stanfield,* 353 F.2d 811 (9th Cir. 1965).

If it is shown that plaintiff's condition would have remained stable for the rest of his life in the absence of defendant's negligent act, then plaintiff is entitled to recover

full damages for the aggravated condition (although not for the original condition itself) for the rest of his life. Prosser, *Law of Torts* 262 (4th ed. 1971); 22 Am. Jur.2d, *Damages* 1122, at 174. But, if it is shown that plaintiff's condition would have inevitably worsened although perhaps at a later time, then clearly defendant is only responsible for the premature aggravation of plaintiff's condition and plaintiff can only recover damages for that period of time until his condition would have worsened by itself. *Kegel* v. *United States,* 289 F. Supp. 790 (D. Mont. 1968); *Evans* v. *S.J. Groves & Sons Company,* 315 F.2d 335 (2d Cir. 1963); *McCahill* v. *New York Transportation Co.,* 20 N.Y. 221 (1911). This result has been described in the following manner:

> Where an innocent cause is impending and a guilty one becomes operative, the imminence of the former is to be taken into account in ascertaining the extent of the damage caused by the latter. Peaslee, "Multiple Causation and Damages", 47 Harvard Law Review, 1127 at 1129 (1934). See also Restatement (Second) of Torts §1433(b) (tentative draft No. 7 1962).

The foregoing, based on common law principles, applies in equal measure to cases arising under the Jones Act which involve pre-existing conditions. Implicit in the District Court's charge, particularly in its statement covering both liability and damages that defendant was liable "for any damages that may have been contributed to in any part" by defendant, is the assumption that the liberal causality test propounded in *Gallick* v. *Baltimore & Ohio R. Co., supra,* and *Rogers* v. *Missouri Pacific R. Co., supra,* for the purpose of establishing liability applies, or ought to be extended, to the determination of recoverable damages.

There can be no question that in a Jones Act negligence case, an employer may be held liable in accordance with the

very liberal causality standard laid down in *Rogers* v. *Missouri Pacific R. Co., supra:*

> Under this statute [FELA, incorporated by reference into the Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. (352 U.S. at 506).

This standard represents a marked departure from the common law principles of causality in tort actions which normally require that a negligent act be a "substantial" factor" in producing an injury and sometimes require that it be shown that the injury would not have occurred "but for" the negligent act or omission. But, while the Supreme Court established a new standard for liability in Jones Act cases, there is no suggestion in either *Gallick* or *Rogers* that the Court intended this liberalization to extend to the common law principles governing the assessment of damages. To the contrary, in *Gallick,* the court reaffirmed the basic principle discussed above—viz. that, "assuming the existence of a threshold tort against the person, then whatever damages *flow from it* are recoverable." See also, *Andrews* v. *Dravo Corporation,* 288 F. Supp. 142, aff'd 406 F.2d 785 (3rd Cir. 1969); *Fair* v. *Mississippi Valley Barge Line Co.,* 239 F. Supp. 158 (S.D. Tex. 1965). Moreover, the common law principles relating to the acceleration of aggravation of pre-existing conditions as set forth in *Kegel, supra,* and *Sweet Milk Co.* v. *Stanfield, supra,* were cited with approval in *Curry* v. *United States,* 327 F. Supp. 155 (N.D. Cal. 1971), a case involving a claim of a seaman's wrongful death. After enunciating the *Rogers/Gallick* rule for causation under the Jones Act, the court in *Curry* then went on to discuss the issue of damages, citing some of the authority noted above. No court has ever attempted in any way to

extend the causality connection test set forth in *Rogers* and *Gallick* to the issue of damages.[22]

In sum, there is absolutely no basis in case law for the "even the slightest" causal connection test under the Jones Act to be extended to replace common law principles regarding damages for these suits. And there is absolutely no logical basis for belief that any "special" rule can properly be applied. Liability for "any" damages even those merely "contributed to" by a shipowner's breach of duty simply makes no sense. There is no more basic, or primitively simple, legal principle than that any defendant is only liable for damages "caused by" its breach. But "contributed to" was the court's charge, at least in part, and the jury was surely misled.

POINT II

The Court's Instructions Failed to Properly Advise the Jury of the Law With Respect to the Full Medical Causality.

In a jury trial, the charge by the court to the jury must accomplish at least two things if the jury is to properly discharge its fact-finding responsibilities. First, the charge must provide the jury with a clear and accurate statement of the principles of law which are to be applied to the facts of the case. *McPhee* v. *Reichel,* 416 F.2d 947 (3rd Cir. 1972).

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22. That the distinction is clearly understood to apply to seamen's cases is demonstrated by the Federal Jury Practice and Instructions, 3rd Ed., Vol. 3, which confirms defendant's submission that damages in a Jones Act case are governed by common law principles. Under the heading of Jones Act Damages, § 94.23, a cross-reference is made to *85.02-85.09 (that is, the common law principles of tort damages). Section 58.09 provides as follows:

> You are not to award damages for any injury or condition from which the plaintiff may have suffered, or may now be suffering, unless it has been established . . . in the case that such injury or condition was proximately caused by the accident in question.

A single inaccurate statement in a charge can vitiate the entire charge if it is on a vital issue[23] and misleads the jury —and this is so notwithstanding that other portions of the charge state the law correctly. The Second Circuit Court of Appeals so held in *DeLima* v. *Trinidad Corporation,* 302 F.2d 585 (2d Cir. 1962) in which case the trial judge included "negligence" language in the seaworthiness portion of his charge. In holding that the mistatement was not harmless error, the court stated:

> "The challenged statement was not equivocal or subject to differing interpretations which might be clarified by other portions of the charge. We cannot assume the jury disregarded it. At best, it was likely to leave the jury highly confused, that alone being grounds for reversal." (*Id.* at 587).

The District Court's misstatement did not, however, have the effect of only confusing the jury, it also had the effect of removing from the jury's consideration any concern whether plaintiff's condition would have worsened in any event. For, if defendants were to be liable for any damages to which they had but contributed in part, once the jury found some contribution (even if only in the form of hastening the need for surgery), it could, according to the judge's charge, award damages for the whole disability and not consider whether plaintiff would have been in any event

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23. That the District Court appreciated that the measure of damages in this "aggravation" case was the crucial issue cannot be be disputed. In introducing the issue before proceeding to charge plaintiff's requests on the issue, the court said:

> That [the issue of plaintiff's thumb condition at the time of the accident and the part it played in the present alleged disability (which the court discussed only in polar extremes)] is an important segment of the total evidence. What has the law to say with regard to that? You have been listening carefully. Given this not 95 per cent but 100 per cent attention (B2).

See also the court's comment (at 353A) that the issue of aggravation was one of the "heaviest points" of the case.

disabled in one, two or ten years. Yet, such consideration is essential in a case in which a plaintiff's pre-existing condition is progressive.

REASON FOR GRANTING WRIT

The trial court never confronted the contradiction in its charge, being seemingly content to refer, at length, to its correct aspects. The district court distorted the proof of past lost wages and exaggerated the claim for future wages.[24] The court's opinion certainly would in no way alert the unfamiliar reader how "thin" respondent's case really was. The question of the sufficiency of the testimony was completely ignored. Surely the need to evaluate the record in the light most favorable to the successful party was here carried too far.

Despite this treatment by the district court, the Court of Appeals offered no analysis of its own. It, too, ignored what is, in petitioners' view, disturbing issue regarding the entire conduct of the trial as well as the *bona fides* of respondent's claim, in addition to the strictly "legal" matters involved. Worse still, what might be inferred from the Court of Appeals' opinion is that the court realized that, as respondent *admitted* at trial, the charge *was* contradictory (and the trial circumstances *far less* than ideal), but believed that the district court got the matter of proximate cause "right enough" to pass. But "right enough" in a highly questionable case where the error was on *the* "heaviest point" and respondent's offer of proof basically a tautology?

Petitioners admit the awkwardness that this petition represents, because of the issues of detailed fact and

24. For example, the court referred to a 14 year work-life expectancy when the claim was for 10. The court's reference to $60,000 represented wages and benefits of a theoretical 7½ month sailor. Respondent never earned that much. His *best* year was 1978, after surgery and just before becoming permanently disabled, we say for purposes of the trial.

credibility; and since there is *no precedent involved.* That was disposed by the district court's failure to discuss, much less sponsor, a view of the law which it had been willing to give as instruction to the jury; and by the Court of Appeals Rule § 0.23. This Court should *not* be burdened with this case! It could not have been, if anything urged above has merit, if the Court of Appeals had treated the matter with appropriate concern.

In *Bollenbach* v. *United States,* 326 U.S. 607 (1945) this Court said (*Id.* at 608) that it had "brought the case here . . ., because it was submitted to a jury in a way that raised an important question in the administration of federal criminal justice." That case involved an affirmance by the second circuit of a conviction under an acknowledged to be incorrect, but close enough, (i.e. "harmless" error) charge, *because* the Court of Appeals was, with ample reason, *certain* of the petitioners' guilt. The judgment of conviction was overturned by this Court because the error was ". . . on a vital issue and misleading . . . [and was not] cured by a prior unexceptional and unilluminating abstract charge" (*Id.* at 612); and because "[d]eviations from formal correctness do not touch the standards by which guilt is determined in our courts" (*Id.* at 615). In *Bollenbach,* Mr. Justice Frankfurter spoke of the issue of the pendulum swing from too heavy emphasis on "prejudicial" error to "harmless" error, where that distinction would depend only on what the appellate court thought of the trial result, and the latter could be found whenever ". . . the appellate court is left without doubt that the one who claims its corrective processes is, after all, guilty" (326 U.S. at 615).

Petitioner's are troubled by the Second Circuit's characterization of the district court's Charge as "sufficiently instructing the jury of petitioners' liability only to the extent of damages resulting from "additional harm" to his arthritic thumb. Judge Cooper charged liability for "additional harm" (B2). But what "harm"—"any damages,"

although only "contributed to" (B4). The conduct of the trial and the whole charge made inevitable the result achieved.

This case presents a problem similar to that addressed in *Bollenbach,* but in the less important area of civil law, and only the part concerned with "injury" cases. Some might see a great deal of money involved, and others might believe that the obligation to give a wholly correct charge on a vital issue in a questionable case was deliberately ignored, because too "cumbersome," where, as all would hope, a review of the trial record by a distinguished bench would *not* have left that panel "without doubt" that this defendant is "after all" properly *liable* for $360,000 on account of the events of May 5, 1975. See *Bollenbach* 326 U.S. at 615.

If litigants are to be forever doomed captives of jury verdicts in cases of open-ended liability, trials should surely be properly conducted. And why should not the next marine engineer (or seaman) with a underlying problem take *his* best "shot," in view of the vast sums that can be "won" at trial? And with no ante. He need not even lose any time from work, save for that period after his verdict while he awaits the final affirmance of his judgment on appeal.

The Second Circuit Court of Appeals should not be allowed to lay down its burden in the fashion its treatment of the issues represents.

Dated: New York, New York
September 2, 1980

Respectfully submitted

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Walker & Corsa
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Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN MILOS Plaintiff, —against— SEA-LAND SERVICE, INC. Defendant.	76 Civil 1848 (IBC) Judgment # 79,0669

The issues in the above entitled action having been brought on regularly for trial, before the Honorable Irving Ben Cooper, United States District Judge, and a jury, on June 5, 6, 7, 8, 11 and 12, 1979, and at the conclusion of the evidence the jury having returned a verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED and DECREED: That plaintiff JOHN MILOS have judgment against defendant SEA-LAND SERVICE, INC., in the amount of $360,000.

Dated: New York, N.Y.
June 13, 1979

Raymond F. Berghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN MILOS, Plaintiff, —against— SEA-LAND SERVICE, INC., and R.J. REYNOLDS INDUSTRIAL LEASING CORPORATION, Defendants.	76 Civ. 1848 (IBC) Opinion # 44092

APPEARANCES:

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IRVING BEN COOPER, D. J.

Defendant moves for a new trial, pursuant to Rule 59, Federal Rules of Civil Procedure, and asks for judgment notwithstanding the verdict, in accordance with the provisions of Rule 50, F.R.Civ.P. Defendant objects to the jury verdict entered June 13, 1979, awarding $360,000 in damages to plaintiff in this action under the Jones Act and the general maritime law. Defendant claims the verdict went against the weight of the evidence; that there were errors of law made at the trial; that the verdict was excessive and that certain actions of the court and counsel caused prejudicial error. Plaintiff has responded with a thorough and cogent defense of the verdict.

In our view, defendant has failed to meet the standard which would compel this court to set aside the verdict under Rule 50. That standard is the same as the requirement for directing a verdict at the close of the evidence, which relief we denied upon defendant's request for it at that time. (Transcript, p. 1285). *Simblest* v. *Maynard,* 427 F.2d 1 (2d Cir. 1970). Nothing has occurred to alter our decision.

Turning to the motion for a new trial, it is clear that the requirements for granting such a motion are not nearly so strict as those applicable to Rule 50. A verdict may be set aside under Rule 59, even if there was substantial evidence to support that verdict, if the court finds the verdict was against the weight of the evidence, or so excessive as to shock the conscience of the Judge. "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." 11 Wright & Miller, Federal Practice and Procedure: Civil § 2803.

The granting or denial of the motion lies almost exclusively within the discretion of the trial judge; his evaluation of the claim must compel the conclusion that justice has not been accomplished by the trial verdict. In a jury case, the exercise of that discretion is somewhat circumscribed:

"[A] decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter." *Id.*, § 2806.

If the trial court determines that the verdict in a case is excessive, it can order a new trial *in toto* or on the issue of damages alone. Additionally, "[T]here is a practice by which the court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount. In this way, the plaintiff is given the option of either submitting to a new trial or of accepting the amount of damages that the court considers justified." *Id.*, § 2807; *Dullard* v. *The Berkeley Associates Co., et al.*, (C.A. 2d 1978) Nos. 731-34; 78-7457, -7512, 7560-61, at p. 4375.

Alleged misconduct will not support a motion for a new trial, in most cases, either because the conduct complained of was not misconduct, or was not prejudicial, or was not objected to at the time, or because any prejudice was cured by the instructions of the court. Wright & Miller, *supra*, § 2809; F.R.Civ.P. 61.

Upon examination of the record at trial and a review of the law applicable to seamen's personal injury cases, we find that the weight of the evidence readily supported this jury's verdict, and that, although generous, the amount awarded was not excessive for this plaintiff.

Defendant alleges that plaintiff failed to adduce sufficient evidence establishing defendant's liability for plaintiff's injury, and that the court "filled in the gap" by erroneously to charging the jury a theory of proximate cause which compelled the jury to find defendant liable.

We find defendant's position to be without merit, both on the record and as a matter of law. Three theories of liability were presented to the jury by the court: Negli-

gence (Jones Act), Warranty of Seaworthiness, and Res Ipsa Loquitur.

The testimony at trial, by plaintiff himself and by supporting and opposing medical witnesses, presented substantial and convincing evidence that plaintiff had indeed suffered the accident he claims on May 5, 1975,[1] that the accident was caused by defendant's negligence and/or breach of the warranty of seaworthiness, and that plaintiff's resulting disability to his right hand ultimately prevented him from continuing as a marine engineer.

Further, we maintain that the court's charge to the jury concerning the applicable standard of liability for the aggravation or acceleration of a pre-existing physical condition was correct, for it included the legal proposition that defendant would be liable for all injuries caused in part by its negligence or breach of the warranty of seaworthiness; that defendant would be liable for all damages resulting from its aggravation or acceleration of the plaintiff's pre-existing physical condition provided it was caused, in whole or in part, by defendant's breach of duty to plaintiff.

Liability

Given the testimony of the plaintiff, the evidence that one of his doctors requested thumb x-rays on June 6, 1975, and the testimony of Drs. Golub and Bouton, plaintiff's medical witnesses, that Milos' condition would be hard to explain in the absence of trauma, there was more than sufficient evidence for the jury to conclude, as it did, that Milos injured his thumb on May 5, 1975. Both doctors testified in great detail that even though plaintiff had pre-existing

1. Plaintiff alleged at trial that while working on board defendant's vessel, he stepped on a slippery food substance defendant had negligently failed to remove, and fell, injuring the right side of his body; the injury so aggravated a pre-existing arthritic condition from which plaintiff was suffering, that it caused him great physical discomfort, led to his ultimate disability and made him unable to continue his work as a chief marine engineer.

arthritis, if he had not incurred trauma he would not have been exposed to surgery and he would not have been unable to work.

If the onset of intense pain and extreme difficulty in the use of his right hand and thumb started in May, 1975 shortly following the shipboard accident, a case of causal relationship and shipowner liability was made out. The credibility of the pain and difficulty of use, following the injury in May, 1975 to plaintiff's right hand, turned on the jury's evaluation of the credibility of Mr. Milos, and its evaluation of the appropriate inferences to be drawn from other testimony and medical records.

The following comment by the Supreme Court in *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 109-110 (1959) is enlightening (in *Sentilles*, the court was faced with a plaintiff-seaman who alleged that an accident on board defendant's vessel aggravated a latent condition of tuberculosis causing him to become seriously ill):

> The jury's power to draw the inference that the aggravation of petitioner's tubercular condition . . . was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was *in fact* the cause. Neither can it be impaired . . . by the fact that other potential causes of the aggravation existed. . . . The members of the jury . . . were sworn to make a legal determination of the question of causation. . . . *The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury.*
>
> *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.*
>
> (emphasis added)

We believe the court's charge on the applicable standard of liability was correct. "A tortfeasor is liable for all resulting damages, though aggravated by the diseased condition of the injured party." *The Jefferson Myers,* 45 F.2d 162 (2d Cir. 1930).

The law is clear that when a defendant's wrongful act or omission aggravates or accelerates a plaintiff's pre-existing condition and disables a plaintiff, thus rendering him unable to continue his work, or said aggravation awakens a dormant condition that causes a plaintiff to experience pain although he had suffered no pain from the condition prior to the aggravation, such defendant is liable in full for the disability and/or pain it caused. Here, the same standard is employed as in every other seaman's injury case: a defendant is liable if, and only if, its breach of duty "played any part, even the slightest" in producing the injury for which damages are sought.

Defendant appears to believe that because plaintiff would not have been disabled by defendant's acts absent his pre-existing condition, defendant is not fully liable for plaintiff's disability; or that in order to recover, plaintiff must show that defendant's acts were the sole cause of the acceleration of plaintiff's disability. These theories of liability are clearly at odds with the applicable law. *Farnarjian* v. *American Export Isbrandtsen Lines, Inc.,* 474 F.2d 361 (2d Cir. 1973); *Davis* v. *Hill Engineering, Inc.,* 549 F.2d 314 (5th Cir. 1977); *Buchalski* v. *Universal Marine Corp.,* 393 F.Supp. 246 (W.D. Wash. 1975); *Spinks* v. *Chevron Oil Co.,* 507 F.2d 216 (5th Cir. 1975).

In fact, there was ample testimony in the record to show that Milos began to suffer debilitating pain in his right hand and thumb, resulting finally in the surgery and rendering him unable to grasp or grip with that hand, *only after* the fall in which he injured himself on board defendant's vessel in May, 1975.

In sum, under the law, defendant is liable for all damages resulting from the aggravation or acceleration of plaintiff's pre-existing condition because the negligence or breach of duty played some part, even the slightest, in producing the injury which caused the plaintiff to become disabled. The jury in this case clearly believed that Milos' fall, caused in part by defendant's negligence, produced plaintiff's pain and accelerated his arthritic condition sufficiently to produce his present disability.

Proximate Cause

Plaintiff at trial presented substantial proof establishing that, absent defendant's breach of duty, plaintiff would not have become disabled prior to the age of mandatory retirement. This should satisfy the issue of "medical causation" which defendant claims the court ignored.

Additionally, we disagree entirely that there is more than one standard of causation in seamen's personal injury actions, whether based on negligence or unseaworthiness. The standard is whether defendant's negligence or breach of duty caused plaintiff's injury "in whole or in part." That standard has been described as "featherweight" in both Jones Act negligence and unseaworthiness causes of action. *Davis* v. *Hill Engineering, Inc., supra,* at 331.

With the consent of both parties, we charged *res ipsa loquitur* as an alternative theory of recovery, and turned over to the jury the question of "control" by the defendant of the area in question.

In their contentions over the court's charges on liability and proximate cause, the parties focus on the court's use of plaintiff's requests to charge Nos. 27 and 28. Defendant claims that by charging plaintiff's request No. 27, the court instructed the jury that plaintiff was not bound to prove that the shipboard injury was the sole cause of

aggravating or accelerating his pre-existing condition; that it could combine with other causes and merely "contribute to" an aggravation. By charging request No. 28, it is alleged, the jury was told that if the vessel was unseaworthy or the officers or the crew negligent, the occurrence of *any* injury resulting therefrom, which was an aggravating or accelerating factor no matter how slight, was a basis for an award of *any* damages which may have been contributed to in any part.

The response, of course, is that the court did not charge that defendant is liable for damages not caused in part or whole by its acts or omissions. Plaintiff's requests to charge 27 and 28, and so charged by this court, clearly instruct the jury that defendant is liable only for such damages as it actually caused. The requests to charge do not instruct the jury as to the amount of defendant's liability, nor does any other part of the charge. Since defendant concedes, as it must, that it is liable if an advancement of plaintiff's disability resulted from defendant's breach of duty to plaintiff, and since this is precisely the rule stated in plaintiff's request to charge 27, defendant has failed to raise a legal question as to the propriety of request to charge 27.

Additionally, contrary to defendant's assertions, request to charge No. 28 does not instruct the jury to hold the defendant liable for damages not resulting from its breach of duty to the plaintiff. In point of fact, the charge states that if the defendant's acts merely advanced a disability that would have occurred in any event, the defendant is to be held liable in damages only for such advancement of the disability caused by it.

Damages

On the issue of damages, we charged the jury that they were to decide damages only after having established that

the plaintiff's evidence, in terms of quality and credibility, was sufficient to support the liability of the defendant and an award of compensation to the plaintiff (Transcript, p. 1428). Loss of wages, pain and suffering, and the degree of permanency of the injuries were presented to the jury as a possible basis for damages, and they were urged to make up their own minds as to the extent, if any.

The fact that Milos drew on his accrued vacation pay during various periods after the accident and prior to trial, does not mean he had no wage loss. Milos did not work May-August, 1975 because of his injury. Since he was earning $3,000 a month even as a second assistant engineer, rather than his accustomed position as chief engineer, plus approximately $600 per month in vacation pay benefits for each month worked, this loss of earnings alone was between ten (10) and fifteen (15) thousand dollars. The earnings he lost from July, 1977 to December, 1977 was certainly a loss causally connected to the shipboard accident. There is absolutely no merit to defendant's contention that because Milos applied for and used his earned vacation pay to sustain him during this period of disability, he thereby forfeited his right to recover from the shipowner for the forced loss of earnings imposed upon him by his pain and disability.

An important factor, as presented by plaintiff's evidence was the severe limitation of plaintiff's ability to perform his work, caused by his particular disability. There was testimony from plaintiff's medical witnesses that Milos' grasp and grip were almost completely lost because of the shipboard accident on May 5, 1975. Both doctors unequivocally stated that Milos could not and should not return to work as a marine engineer.

A key fact that defendant fails to confront is that Milos would be earning in the area of $60,000 per year if defendant had not caused the injury which ultimately dis-

abled him. Milos lost the effective use of his right hand; the evidence showed he had a fourteen year expected work-life. The jury was entitled to award damages for fourteen years wage loss at $60,000 per year, resulting in an amount (for that item alone) well in excess of the verdict. The evidence convincingly pointed up that the accident blasted his future career, as a chief engineer on first-class vessels.

In sum, defendant contends in his motion that the verdict was excessive, and unsupported, in light of conflicting evidence as to whether plaintiff's present incapacity relates as much to the injury caused by defendant's negligence as it does to plaintiff's pre-existing arthritic condition. Defendant disputes the jury's evaluation of the extent of plaintiff's incapacity as being contrary to the weight of the evidence.

In fact, it appears to us that the jury, being entrusted with the obligation and duty to decide the issues of fact posed in this case, carried out its duty admirably and effectively. The total trial record demonstrates sufficient evidentiary support of the verdict.

Counsel for the defendant, in his post-trial memorandum, continually invades the exclusive province of the jury, the sole fact-finders in this case. He takes unto himself its function, giving certain facts *his* weight, *his* estimate, and brushes aside other facts as though they did not exist.

GRUNENTHAL

On this issue of the scope and weight of the jury's findings, and the standard of review to be applied by the court to the jury's findings, we regard as particularly pertinent a case that came before us in 1967, *Grunenthal* v. *Long Island Railroad Co.*, 292 F.Supp. 813 (S.D.N.Y. 1967), aff'd in part, rev'd and remanded on issue of excessiveness of verdict, 388 F.2d 480 (2d Cir.), rev'd and remanded 393 U.S. 156 (1968). In this FELA action (we note here that the

FELA is specifically incorporated into the Jones Act, making its provisions applicable to seaman's personal injury actions), plaintiff, a railroad track worker, sued for damages when his foot was crushed by a railroad tie falling on it. Plaintiff had worked for the railroad his entire adult life; he was 45 years old at the time of the trial, with a life expectancy of 27 years. Plaintiff had been earning approximately $6,000 per year at the time of his injury (he was an acting foreman) and the evidence showed he could have expected substantial increases in salary over the remainder of his working life.

The jury was instructed to consider recovery for past and future wages lost, as well as damages for pain and suffering. The verdict was for $305,000.00. The evidence showed that $27,000 was the amount of past wages lost, and that $100,000-$150,000 approximated future lost earnings; with another $100,000-$150,000 estimated for pain and suffering.

The trial court's decision not to declare a mistrial due to excessiveness of the verdict was reversed by the Court of Appeals for the Second Circuit, but upheld by the Supreme Court which independently reviewed the evidence and upheld the trial court.

In *Grunenthal,* we made the following comments (in the main, applicable here) on defendant's motion for a new trial:

> We were impressed with the attentiveness of the jury throughout the course of the trial, its outward show of examplary deportment, the considerable time it devoted to deliberating on both the liability and damage phases of the trial, and so expressed ourselves in open Court before excusing the jury.
>
> Clearly we have no way of knowing the jury's actual evaluation of the various items making up total damages. We can and must indulge, however, in a

> fairly accurate estimate of factors to which the jury gave attention, and favorable response, in order to arrive at the verdict announced.
>
> We can appreciate the heavy weight given the total trial record by the jury in plaintiff's favor. Among other impressive phases of the trial were, (a) the candor evinced throughout by plaintiff, the total absence of exaggeration in his testimony especially when describing the excruciating physical pain and mental anguish he endured since the accident... (b) the unrebutted testimony of plaintiff's medical expert . . . (c) tantamount to no contest as to each item of damages was the total trial record adduced by plaintiff....
>
> The jury, impressed by the uncontroverted proof adduced by plaintiff, may well have adopted in toto its full significance and drawn such normal and natural inferences therefrom as the law endorses.

The court continued, evaluating the evidence presented to the jury, in the following vein:

> On the record here, [the jury] had good and sufficient reason to regard and assess plaintiff's pain and suffering as excruciating, deep-seated, unrelenting and debilitating—the inducing cause of his constant misery. Reasonable and controlled reaction to pain and suffering varies with man's innate, sensitive response to the woes and laments of those stricken and bereaved—especially where clearly unearned or cruelly inflicted. Who is to say this jury was not so composed? If the jury believed such an award fair and proper, we find nothing untoward, inordinate, unreasonable or outrageous—nothing indicative of a runaway jury or one that lost its head—in its reflected resolution to so respond.

> Concededly, at first blush the verdict appears excessive. However, a detailed analysis of the proof covering the items making up total damages in the light of this particular trial record, with resounding emphasis in plaintiff's favor all down the line, points to a jury that was generous—not generous to a fault or outside the bounds of legal appropriateness.
>
> We are told, and properly so, that the jury's discretion in the assessment of damages in a case predicated on subject matter such as we deal with here is wide—not wild. Theirs is the responsibility. A judge must not interfere with the jury's verdict unless he conscientiously believes it excessive. *Dagnello* v. *Long Island R.R. Co., supra; Dellaripa* v. *New York, New Haven & Hartford R. Co.,* 257 F.2d 733, 735 (2d Cir. 1958). Applying that criterion, we cannot in all good conscience say so.

On appeal to the Second Circuit Court of Appeals, the court reversed denial of the motion, and remanded, requiring a remission of part of the jury verdict, 388 F.2d 480 (Hays, J. dissenting). The court found no error in the conduct of the trial, but held the verdict to be "grossly excessive," and set it aside under the apparent authority of *Dagnello* v. *L.I.R.R.,* 289 F.2d 797 (2d Cir. 1961). Commenting on the trial court's decision, the majority stated: "In his enthusiasm for what he described to the jury after the verdict as their fine 'spirit' and 'dedication' and 'with resounding emphasis in plaintiff's favor all down the line' the trial judge, we think, supplied any 'absence of exaggeration' in plaintiff's testimony by doing a little exaggerating himself. . . ." (at 484).

However, Judge Hays, in dissent, cited the following comments on behalf of the trial court's decision:

> The trial judge, who was surely in a better position to weigh the evidence that we are, referred to

> "the total absence of exaggeration" in plaintiff's testimony . . . . We are not justified in substituting our opinion for the verdict of the jury except in the most extreme case. [Citing *Neese* v. *Southern Ry. Co.*, 350 U.S. 77 (1955)]: "If the action of the trial court . . . [is] not without support in the record . . . its action should not . . . [be] disturbed by the Court of Appeals."
>
> It is to be hoped that the disregard by the majority in this case for the integrity of the jury's verdict will not be taken by the district courts to justify a widespread increase in the use of remittitur. (at 485-486)

The Supreme Court granted certiorari, and issued an opinion in support of the actions of the trial judge, while disagreeing with the standard of review invoked by the Court of Appeals:

> [A]ssuming, without deciding, that the Court of Appeals was empowered to review the denial and invoked the correct standard of review, the action of the trial judge, as we view the evidence, should not have been disturbed . . . .
>
> The Court of Appeals regarded its inquiry as limited to determining whether the trial judge abused his discretion in denying the railroad's motion. Its guide for that determination, the court stated, was the standard of review announced in its earlier decision in *Dagnello* v. *Long Island Railroad* Co. (citation omitted) . . . .
>
> We read *Dagnello*, however, as requiring the Court of Appeals in applying this standard to make a detailed appraisal of the evidence bearing on damages.

The Court went on to cite from the record the evidence in support of the trial judge's decision that the jury verdict was reasonable and not excessive; in effect, making independent findings of fact, and noting approvingly the comments of the trial judge on the credibility of the witnesses, particularly the plaintiff, as supporting on the record the jury's findings of fact.

Application of these same principles, enunciated in support of our decision in *Grunenthal,* to the Milos matter, we believe, presents similar grounds for denying the instant motion for a new trial.

Points we emphasize here are Milos' own credibility and restrained evaluation of his disability; the medical evidence supporting the jury's evaluation of his incapacity to perform his job in the future; the testimony as to his wages lost—past and future, all of which would tend to support, on the record as a whole, the verdict awarded by the jury.

ALBANESE

Another case in which we were involved, strikes us as relevant and informative: *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats* v. *International Terminal Operating Co.,* 346 F.2d 481 (2d Cir. 1965) (revised opinion), rev'd and District Court judgment reinstated 382 U.S. 283, on issue of correctness of charge to jury on negligence. *Albanese* involved an action by a longshoreman against a shipowner for injuries suffered from fumes of monoxide gas breathed by the plaintiff in the ship's hold; the shipowner seeking indemnity, filed a third-party complaint against the stevedore (ITO). Plaintiff alleged that the shipowner had been informed by the stevedore, through one of its officers, of the fumes in the hold, but had failed to carry out its promise to promptly turn on the ship's ventilation system; the plaintiff's injuries resulted. The shipowner as third-party plaintiff claimed that the stevedore was liable for having breached its duty to provide reasonably safe work-

ing conditions, charging that the stevedore could have called its men off the job and had blowers on the pier which it could have brought in when the ship failed to turn on its own ventilation system.

The District Court (Cooper, J.) entered judgment upon a jury's verdict, awarding plaintiff $145,000 damages, and ruled in favor of the stevedore on the third-party complaint. No written opinion was filed. The Court of Appeals for the Second Circuit set aside the judgment and remanded on both actions, finding that the shipowner had not been negligent for failing to turn on the ventilating equipment, having had no actual notice of the problem; and finding that the stevedore was not absolved from responsibility for the injuries by having informed the ship's officer of the dangerous condition, if it had in fact done so.

The Court of Appeals held there had been error in the District Court's charge, wherein it had charged constructive notice as a basis for the shipowner's liability, as well as actual notice, in presenting the issue of negligence to the jury.

All parties appealed to the Supreme Court, and the court granted certiorari to Albanese, while denying it on the third-party action. The Court, sitting *per curiam*, held:

> We believe that the judgment of the Court of Appeals setting aside the judgment for petitioner Albanese on the ground that the trial court incorrectly charged the jury on the issue of negligence is erroneous.
>
> [W]e not only reverse the judgment of the Court

> of Appeals . . . but reinstate the District Court's judgment in his favor.

Upon remand of the third-party action between the shipowner and the stevedore, the District Court (Levet, J.) conducted a second jury trial, in which the jury found for the third-party defendant, the stevedore, on the issue of its liability for indemnity to the shipowner for the recovery by Albanese. At the retrial, the court had given Special Interrogatories to the jury on the issue of notice of the dangerous condition to the shipowner. The jury found that such notice was given, and returned a general verdict in favor of the stevedore.

The court denied the shipowner's motions for judgment notwithstanding the verdict and for a new trial, pointing out that: "[T]he jury verdict on this retrial was in accord with previous determinations." 279 F.Supp. 635, 637 (S.D.N.Y. 1967). The court held: "The general rule . . . is that whether a stevedore has breached its warranty of workmanlike performance and whether the shipowner's conduct precludes indemnity are *primarily factual, not legal, questions.*" *Id.*, at 640 (emphasis added). In denying the motion for a new trial, the court stated: "The shipping company appears to . . . disregard the clear conclusion of the jury at retrial that [the stevedore] reasonably relied on the ship to operate the blowers to clear the hold."

The shipowner again appealed the dismissal of its claim for indemnity to the Court of Appeals for the Second Circuit. In an opinion at 392 F.2d 763 (2d Cir. 1968), the Court of Appeals reversed denial of judgment notwithstanding the verdict, and required entry of judgment for the shipowner for full indemnity. The majority stated as its position that it felt there was *no question of fact to be presented to the jury* on the two issues of whether the

stevedore had breached its warranty, and whether the shipowner was nonetheless liable, having received notice of the dangerous condition.

In light of the history of this action, and faced with two jury verdicts in direct opposition to the findings of the Court of Appeals majority, dissenting Judge Moore presented the following argument in support of the jury's verdict:

> [The shipowner] had to prove on the retrial of the indemnity claim that its liability was proximately caused by a breach of warranty of workmanlike service on the part of [the stevedore]. From the evidence on the retrial, the jury could have found that [the stevedore] did not breach its warranty or act unreasonably. . . .
>
> [S]ince the jury has decided that it was reasonable for [the stevedore] to rely momentarily on [the ship's ventilating system] being turned on, any failure on the part of [the stevedore] to use its . . . portable blowers is irrelevant. This is not to say that a jury verdict for [the stevedore] was required by the evidence, but only that the jury's decision should not be disturbed. The entry of judgment notwithstanding the verdict (and the overruling of this court's prior determination that there was a triable issue on essentially the same facts as are before us now) is in my opinion an *unjustified usurpation of the function of the jury.*
>
> at 766 (emphasis added).

That is exactly our position here: we must take great care to avoid an "unjustified usurpation of the function of the jury," especially where clear issues of fact appear in

the trial record and ample evidence exists to support the verdict.

We are overwhelmingly convinced that the record here is replete, practically saturated, with factual questions, the resolution of which support the findings of the jury (which is not to say no other result was conceivable).

In the last analysis, we see overwhelmingly support for the observation (in essence) of Mr. Justice Holmes: that the life of the law has not been logic; it has been experience. It is exactly that "experience" which brought the jury system into its very existence; and it was the jury's "experience" which resulted in the verdict herein recorded and now under attack.

Conclusion

The applicable law strongly supports plaintiff's contentions that under the Jones Act and general maritime law, the defendant is liable in damages for injuries to which defendant's negligence or the vessel's unseaworthiness contributed in "even the slightest degree."

Additionally, as to medical causation, only a slight suggestion of causation between injury and disease need be shown; and the fact that the injury might reasonably be attributable to factors other than the defendant's negligence is not a bar to a verdict for the plaintiff.

The defendant here is entrapped in semantic distinctions which find no support in the law. His claim that the court should have charged different standards of proximate cause for medical causation, negligence, and seaworthiness is simply wrong as a matter of law.

The questions of law raised by defendant's motion papers have been discussed extensively, *supra*. As to the improper admission or rejection of testimony at trial, those points were discussed at the time, and do not serve as a

basis for mistrial; nor was there any misconduct by counsel or the court worthy of the name. The only question of any validity is whether the verdict was so excessive as to be against the weight of the evidence, or shocking to the conscience of the court, or clearly revealing errors of law and we feel that on the record as a whole, no such error appears.

Accordingly, defendant's motion is denied in all respects, and the jury's verdict remains undisturbed. There being no just reason for delay, let judgment be entered. (Maintenance and cure having been reserved to the court by agreement of the parties, it will be the subject of a separate judgment.)

SO ORDERED:

New York, N.Y.
September 25, 1979

/s/ (IBC)

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of March, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS
HON. AMALYA L. KEARSE
Circuit Judges

HON. MORRIS E. LASKER
United States District Judge
Sitting by Designation

JOHN MILOS,
Plaintiff-Appellee,
v.
SEA-LAND SERVICE, INC., and R. J. REYNOLDS INDUSTRIAL LEASING CORP.,
Defendants-Appellants.

Docket No. 79-77

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed*.

We find no reason to overturn the jury verdict for the plaintiff. The district court did not err in its charge to the jury concerning the proper standard for awarding damages. The charge sufficiently instructed the jury that damages should be awarded to plaintiff only to the extent that his fall resulted in additional harm to his arthritic thumb. The court's charge on defendants' liability for damages caused by their "slightest" negligence was also proper.

Defendants' contentions that judicial misconduct and errors in the admission of medical testimony constituted reversible error are also without merit.

By _____

_____
Deputy Clerk

_____
Roland Henry

_____
William H. Timbers

_____
Amalya L. Kearse
Circuit Judges

_____
Morris E. Lasker
United States District Judge
Sitting by Designation

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS,
HON. AMALYA L. KEARSE,
Circuit Judges

HON. MORRIS E. LASKER,
District Judge

JOHN MILOS, *Plaintiff-Appellee,* v. SEA-LAND SERVICE, INC. and R. J. REYNOLDS INDUSTRIAL LEASING CORP., *Defendants,* SEA-LAND SERVICE, INC., *Defendant-Appellant.*	79-7743

A petition for a rehearing having been filed herein by counsel for the Appellant Sea-Land Service, Inc.

Upon consideration thereof, it is Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and eighty.

JOHN MILOS, *Plaintiff-Appellee,* v. SEA-LAND SERVICE, INC. and R. J. REYNOLDS INDUSTRIAL LEASING CORP., *Defendants,* SEA-LAND SERVICE, INC., *Defendant-Appellant.*	79-7743

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Sea-Land Service, Inc. and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is Ordered that said petition be and it hereby is DENIED.

Chief Judge
IRVING R. KAUFMAN

APPENDIX B

I would say that one of the heaviest points on which there has been concentrated material adduced by both sides is what I am coming to now, and that relates to prior existing injury.

Counsel have delineated this all-vital issue of proof. The essence of the position taken by the defense is that the injuries suffered by plaintiff subsequent to the accident of May 5, 1975, constituted a continuation of a physically limited condition which plaintiff had over the prior years.

In other words, the defendant maintains that the disabilities which plaintiff incurred after the accident of May 5, 1975, were not caused by that accident, but represent simply a continuation of a prior existing physical limitation.

That is an important segment of the total evidence. What has the law to say with regard to that? You have been listening carefully. Give this not 95 per cent but 100 per cent attention.

If a person suffers from a physical disability, even if it continues for a long time, and then a wrongful act is committed upon his person, an irresponsible act which aggravated the condition, the fact that he had a disability condition before does not absolve the person who committed the wrong, but there must be proof by a preponderance of the credible evidence that the aggravated physical condition was induced by the accident. You take the workman as you find him. If he has had arthritis and does the work, that's all that's required of you. If you are fortunate in having a workman who is devoid of any kind of ailment, that's your good fortune.

But can it be that when one is suffering to some extent from an ailment, but carries on his work, and then a wrong is done him, that because he has that ailment he should be tossed out of court? Not at all. The law says his remedy is as complete as would be the case if that injury had occurred to a person totally devoid of any kind of physical limitation.

I might add, on the subject of aggravation of an existing condition that a person has as a result of an injury, the purpose of the law is to award as far as possible just and fair compensation for the loss or injury that directly flowed from the wrong done to the plaintiff. Therefore, in considering damages, you may only make an award for those injuries which were caused by the shipowner's failure of legal responsibility.

If you find from the credible testimony and by a preponderance of the evidence that the plaintiff had a preexisting condition which was aggravated or triggered by the accident with which we are concerned, and that had that accident not occurred the condition would have remained relatively quiescent, he is entitled to be compensated for the consequent injury or damage.

But if you find that the plaintiff's injury resulted solely from the previous condition, he is not entitled to recover. Aggravation in contemplation of law refers to those cases where a plaintiff already incapacitated to some degree by a disease or an injury suffers a worsened condition as a result of a defendant's wrongful act. In such cases the defendant is liable for the additional harm that he caused, even though a normal person's injury would have been less severe.

Please remember that a defendant takes a plaintiff as he finds him. This means that if Mr. Milos had a permanent or physical condition which predisposed him to greater injury or disability than another person might have sustained from the same accident, this is no defense to the shipping company. If the company is liable it must render full compensation for the injuries Mr. Milos sustained even if they are greater than another person might have sustained in the same situation.

Similarly, if Mr. Milos had a preexisting injury or a latent, quiet or dormant condition and such condition was aggravated or lit up as a result of this accident, the shipping company must compensate him for such aggravation or lighting up, so to speak. The law recognizes the practical circumstances or fact that several or many factors may operate to aggravate, precipitate or accelerate a previous medical condition and that each one of these may be a contributing factor.

Mr. Milos was not bound to prove that the accident aboard the ship was the sole cause of aggravating or accelerating his preexisting physical condition, if you find that there was any such condition.

If you find both the shipowner's negligence or breach of his warranty of seaworthiness on one hand and other causes on the other hand have contributed to causing, aggravating or accelerating a seaman's preexisting condition, the shipowner is not relieved of liability. Under the maritime law, if the shipowner's negligence or any unseaworthy condition aboard ship have played any part, even the slightest, in contributing to the advancement of Mr. Milos' preexisting condition, if any, he is entitled to recover damages.

If an unseaworthy condition relating to this accident aboard ship contributed in any part, no matter how slight, to accelerating, aggravating or precipitating any preexisting condition of Mr. Milos' hand or arm or body, he is entitled to recover. This is so whether plaintiff had a preexisting inactive condition or if he had a preexisting active condition. If he had a preexisting condition when he joined the ship and that preexisting condition was aggravated or accelerated by defective conditions aboard ship in his working area, then the shipping company is liable to him in damages for that aggravation or acceleration. Otherwise not.

The fact that plaintiff may have had a preexisting condition, if you so find, does not bar his right to recover if the

shipboard condition was an aggravating or accelerating factor, no matter how slight, for the law is that a defendant—I repeat—takes the plaintiff as he finds him and must compensate him for any damages that may have been contributed to in any part by a defective condition aboard ship.

I have said that same thought in a half dozen different ways.

If you find that before this accident the plaintiff had a hand or arm or shoulder condition and because of this injury his condition flared up and became the cause of suffering and disability, then the plaintiff is entitled to recover for any disability or pain resulting from such aggravation.

Even if you find that the injuries to Mr. Milos were far greater than would be expected in a normal person from the nature and extent of the accident, he is entitled to recover to the full extent of those injuries.

Here are the words of a celebrated case laid down by the high court. "However little the incident might have injured the hand, arm or shoulder"—I am interposing those words applicable to this case, hand, arm or shoulder. "However little the incident might have injured the hand, arm or shoulder of a normal man, if it injured the plaintiff enough to subject him to a long and severe and even permanent ordeal, the defendant must completely indemnify him regardless of his idiosyncrasy."

This language, from another appellate court: "A tortfeasor"—and that means a liable defendant—"is liable for all resulting damages, though aggravated by the diseased condition of the injured party. A sickly or maimed man recovers for everything occasioned by the wrong, though he would not have suffered so much had he been whole."

We will take a short recess.

No. 80-350

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1980

SEA-LAND SERVICES, INC., and R.J. REYNOLDS INDUSTRIAL LEASING CORP.,

Petitioners,

vs.

JOHN MILOS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

The instant action is a seaman's action for personal injuries. The plaintiff, John Milos, claimed that he slipped in a large accumulation of greasy food substance (probably a combination of ketchup and mayonnaise) and thereby aggravated a pre-existing (but asymptomatic) arthritic condition. The medical testimony showed "that Milos began to suffer debilitating pain

in his right hand and thumb, resulting finally in the surgery [fusion of the carpometacarpal joint] and rendering him unable to grasp or grip with that hand *only after* the fall in which he injured himself on board defendant's vessel in May, 1975" [A7,[1] *Milos v. Sea-Land Serv., Inc.,* 478 F. Supp. 1019, 1023 (S.D.N.Y. 1979)]. Plaintiff also "presented substantial proof establishing that, absent defendant's breach of duty, plaintiff would not have become disabled prior to the age of mandatory retirement" (A8; *Milos v. Sea-Land Service, Inc., supra,* 478 F. Supp. at 1023).

Defendants contended at trial that Milos' present disability would have occurred even absent the trauma and that Milos was not in fact disabled. The jury may have some understandable difficulty in accepting defendants' logically inconsistent factual claims. At any rate, defense counsel elected to pursue both positions and the resulting dilemma was of his own making.

Faced with the dispute between the parties as to causation and damages, the jury unanimously returned a verdict in favor of Mr. Milos and in the amount of $360,000. Defendants then moved for judgment notwithstanding the verdict or a new trial (basically on the same grounds now raised again in their petition) and the District Court denied the motion in its entirety. The opinion of the District Court, which is reported at 478 F. Supp. 1019 and also at pages A2-A21 of petitioners' appendix, reviewed the evidence and the parties' respective claims in detail. The District Court concluded:

> "We find defendant's position to be without merit, both on the record and as a matter of law. Three theories of liability were presented to the jury by the court; Negligence (Jones Act), Warranty of Seaworthiness, and Res Ipsa Loquitur.

1. All such references refer to pages in petitioners' appendix.

> The testimony at trial, by plaintiff himself and by supporting and opposing medical witnesses, presented substantial and convincing evidence that plaintiff had indeed suffered the accident he claims on May 5, 1975, that the accident was caused by defendant's negligence and/or breach of the warranty of seaworthiness, and that plaintiff's resulting disability to his right hand ultimately prevented him from continuing as a marine engineer" (A4-A5; 478 F. Supp. at 1021-1022).

Undaunted by the jury's rejection of their claims and the District Court's subsequent rejection of their claims, defendants appealed to the Court of Appeals for the Second Circuit raising the same arguments rejected by the trial court, *e.g.*, plaintiff was not disabled, plaintiff would have been disabled anyway, the award was excessive, the verdict was against the weight of the evidence and the charge incorrectly instructed the jury with respect to damages and causation. The Court of Appeals rejected defendants' arguments and unanimously affirmed (A22-A23).

Defendants next filed a petition for rehearing with the Court of Appeals. The petition was unanimously denied (A24). Defendants then submitted a petition for rehearing in banc. This petition was also denied by reason of "no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion" (A25).

Thus, defendants' present factual arguments were unanimously rejected by the jury, by the trial judge, and by the three judge panel of the Court of Appeals. In addition, no judge of the Court of Appeals, Second Circuit deemed defendants' arguments worthy of further review. And now defendants seek review by the Supreme Court of the United States with respect to those same arguments.

As might be expected, there are reasons why six jurors and four federal judges (Hon. Irving Ben Cooper, D.J.; Hon. William H. Timbers and Hon. Amalya L. Kearse, Circuit Judges; and Hon. Morris E. Lasker, District Judge Sitting by Designation) have unanimously rejected defendants' claims time and again. One reason is that defendants' presentations of the evidence adduced at trial have been, at the risk of understatement, grossly distorted. And here we refer not only to the instant petition but also to defendants' post-trial and appellate briefs. In this regard, Judge Cooper observed:

> "Counsel for the defendant, in his post-trial memorandum, continually invades the exclusive province of the jury, the sole fact-finders in this case. He takes unto himself its function, giving certain facts his weight, his estimate, and brushes aside other facts as though they did not exist" (A11, 478 F. Supp. at 1025).

We respectfully submit that Judge Cooper could have said a great deal more about defendants' "style" of selective review of the evidence.

We have no desire to waste this Court's time with an exhaustive presentation of evidence reviewed and re-reviewed by four competent judges who found no difficulties presented by the case. (Indeed, the Court of Appeals evidently concluded that the defendants' claims did not merit anything beyond summary order pursuant to Fed. R. App. Pro. 47). However, because we would not want this Court to conclude that the facts of this case have any relation to the "facts" presented in the petition, we address by way of example, the distortions in one small part of the petition, specifically, the very first page of the petition, page i, petitioners' Questions Presented for Review.

On the very first page of their petition, defendants make three factual claims which, to say the least, are inaccurate.

Defendants there claim: (1) "special damages [were] less than $700"; (2) prior to trial Milos "had worked for 17 continuous months without interruption, save for vacations, until one week before trial"; and (3) the "claimed 'injury' was never reported nor ever diagnosed." In point of fact, Milos lost at least $50,000 in past earnings (JA506-508)[2], including ten to fifteen thousand dollars in the three months following the injury (A10; 478 F. Supp. at 1024). As for the "continuous months without interruption", Milos missed work from May to August of 1975 during which time he was marked "not fit for duty" by the USPHS (JA481-482), was treated at the USPHS in Charleston, South Carolina in August of 1976, and missed work from July to December of 1977 while undergoing the fusion operation (A40, 478 F. Supp. at 1024). The evidence further indicated that Milos was in severe pain described as "excruciating" (JA431-432) and "terrible" (JA799) throughout the post-accident, pre-trial period. Finally, as to petitioners' claim that the injury was never reported or diagnosed, petitioners apparently forgot that Dr. Dale T. Bouton, a physician selected by defendants' own claims adjustor, examined Milos in August 1975 and served defendants with a report fully detailing the injury (Exh. 13). Petitioners also forgot that Milos testified as to pain in May of 1975 (JA488-489) and that such testimony was corroborated by Engineer John B. Ralph (JA1326, 1343). And petitioners "forgot" that x-rays of the thumb were ordered on June 6, 1975 (Exh. 11) and that every single doctor who testified at trial, including defendants' own Dr. Sidney A. Bernstein, agreed that such request indicated that Milos had made complaints regarding pain in that area as a result of his fall (JA763-766, 909-910, 1013-1016, 1466).

The "facts" as represented in the petition have little relation to the evidence adduced at trial. That evidence was reviewed by six jurors, one trial judge, and three appellate judges. No juror

2. All such references refer to pages in the joint appendix below.

or judge has yet concurred with petitioners' view of the evidence. No valid purpose would be served by further review. Certainly, the questions of credibility and the assessments of damages present a less than compelling basis for the grant of certiorari. Accordingly, respondents respectfully request that the petition be denied in all respects.

REASONS FOR DENYING THE WRIT

POINT I.

The charge to the jury and the jury's verdict have received more than adequate review.

As the Court well knows, the proper standard of causation in a maritime personal injury action is "any part, even the slightest." The rule was stated by this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506 (1957):

> "Under this statute [FELA and Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest,* in producing the injury or death for which damages are sought" (emphasis added).

There can be no question that the *Rogers* standard of causation remains good law.

Petitioners have repeatedly claimed that the jury was improperly instructed that the shipowner could beheld liable for damages its negligence did not contribute to in any part, even the slightest (*see, e.g.*, pages 17-22 of the petition). However, no such instruction was given. The District Court concluded that defendants were "entrapped in semantic distinctions" (A20, 478 F. Supp. at 1028) and that the charge instructed that "if the

defendants' acts merely advanced a disability that would have occurred in any event, the defendant is to be held liable in damages only for such advancement of the disability caused by it" (A9, 478 F. Supp. at 1024).[3] The Court of Appeals agreed

---

3. In point of fact, it was defendant's burden of proof to show that the pre-existing quiescent condition would have disabled plaintiff absent the trauma imposed by defendant's breach of duty. *Steinhauser v. Hertz Corporation*, 421 F. 2d 1169, 1173 (2nd Cir. 1970); *Evans v. S.J. Graves & Sons Company*, 315 F. 2d 335, 347-348 (2nd Cir. 1963); *Kegel v. United States*, 289 F. Supp. 790, 796 (D. Mont. 1968). There was no evidence to suggest that the disability would have occurred absent the trauma. Dr. Golub testified that "there is nothing to suggest that he would have ever required surgery" (JA947-48), and Dr. Bouton stated that Milos would have gone on "indefinitely" without the need for surgical intervention (JA1097-99). Dr. Wickendon had no real opinion on the subject (JA1238) and nowhere stated that Milos was "bound to", or even "likely to" to require surgery absent the trauma. Defendant's expert, Dr. Bernstein, conceded causation attributable to the trauma (JA1459-60, 1464), but never said whether surgery would have resulted absent the trauma. Yet, the jury was instructed.

> "So you will readily recognize that the law emphasizes that before any plaintiff may claim damages, he must show that the claimed *injuries sustained resulted from the accident* and not from some other cause or for some other reason" (JA345) (emphasis added).
>
> "The plaintiff cannot recover damages from a defendant for *any physical condition, disability or consequential damages* which were not proximately caused by any *negligence* of the defendant or any *unseaworthiness* of the ship" (JA347) (emphasis added).
>
> "I might add, on the subject of *aggravation* of an existing condition. . . , in considering damages, you may *only* make an award for those injuries which were *caused by the shipowner's failure of legal responsibility*" (JA355) (emphasis added).
>
> "Aggravation in contemplation of law refers to those cases where a plaintiff already incapacitated to some degree

(Cont'd)

that "[t]he charge sufficiently instructed the jury that damages should be awarded to plaintiff only to the extent that his fall resulted in additional harm to his arthritic thumb" (A23). Evidently, petitioners' interpretation of the charge is unique.

Petitioners' view of the weight of the evidence is also unique as a reading of the opinions below demonstrates.

The jury's resolution of the questions of fact do not warrant further review.

POINT II.

The Court of Appeals' decision not to comment on all of petitioners' arguments does not indicate such arguments were not adequately considered.

Petitioners conclude that the Court of Appeals' decision to dispose of its appeal by summary order without discussion of each of the multitude of arguments raised indicates that the arguments were not adequately reviewed. This is a curious analysis. Obviously, the enactment of the provisions for disposition by summary order contemplated appeals unworthy of extended treatment. Evidently, the Court of Appeals deemed that petitioners' appeal qualified in the category of appeals unworthy of extended treatment. There is no reason to assume that the Court shirked its responsibilities and failed to consider petitioners' claims. Rather, the obvious conclusion is that the Court did read petitioners' brief and found the arguments raised therein not only devoid of merit, but utterly unworthy of discussion. We fail to see how this makes a case for review by the Supreme Court of the United States.

(Cont'd)

by a disease or an injury suffers a *worsened condition* as a result of defendants' wrongful act. In such cases the defendant is liable for the *additional harm that he caused,* even though a normal person's injury would have been less severe" (JA355-356) (emphasis added).

CONCLUSION

The legal interest rate is currently only 6%. 28 U.S.C. §1961; New York General Obligations Law, §5-501-1. As the Court. well knows, petitioners can currently invest plaintiff's award at a much higher rate of return. This, we suggest, adequately explains the petition.

We respectfully request that the petition be denied in all respects.

Dated: October 8, 1980
New York, New York

Respectfully submitted,

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